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NO. _____

IN THE

Supreme Court of the United States

DON'T WASTE WASHINGTON LEGAL
DEFENSE FOUNDATION,
Petitioner,

v.

STATE OF WASHINGTON, et al.,
Defendants,

v.

WASHINGTON STATE BUILDING AND CONSTRUCTION
TRADES COUNCIL, AFL-CIO, et al.,
UNITED STATES OF AMERICA,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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ABCD AT CRAFTSMAN PRESS, SEATTLE

QUESTIONS PRESENTED

1. Is a state law (Initiative 383) limiting import of low-level radioactive wastes consistent with the Commerce Clause, when enacted solely for health and safety reasons and contrary to the state's economic interests?

2. Has Congress preempted state regulation through a statute expressly reaffirming the states' responsibility to manage low-level wastes?[1]

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[1]Petitioner does not contend before this Court that the State of Washington may regulate high-level radioactive waste storage and transportation or the lawful activities of the United States. These issues were addressed by the courts below.

Petitioner is Don't Waste Washington Legal Defense Foundation, a nonprofit Washington corporation affiliated with the Don't Waste Washington Committee, sponsor of Initiative 383. The other parties are: Washington State Building & Construction Trades Council, AFL-CIO; Washington

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[1] (Cont.)

Voice of Energy; US Ecology, Inc.; Tri-City Nuclear Industrial Council; Tri-State Motor Transit Company; Precision Cast Parts Corporation; Northern States Power Company; Chem-Nuclear Systems, Inc.; John C. Spellman, Governor of Washington; Kenneth Eikenberry, Attorney General of Washington; Alan J. Gibbs, Secretary of the State of Washington; the State of Washington; United States of America.

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IN THE

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OCTOBER TERM 1982

DON'T WASTE WASHINGTON LEGAL
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OPINIONS BELOW

The District Court for the Eastern District of Washington, McNichols, J., granted summary judgment to respondents and held Initiative 383 unconstitutional. 518

F. Supp. 928 (1981). The Court of Appeals for the Ninth Circuit, Goodwin, J., affirmed. 684 F.2d 627 (1982).

BASIS FOR JURISDICTION

The decision of the Ninth Circuit was filed on August 17, 1982. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §§ 1254(1), 2101(c).

CONSTITUTIONAL PROVISIONS AND STATUTES

The Commerce Clause (U.S. Const. Art. I, § 8, cl. 3), the Supremacy Clause (Art. VI), pertinent provisions of the Low-Level Radioactive Waste Policy Act (42 U.S.C. §§ 2021b-d), and Washington Initiatve 383 are set forth in the appendix to this petition.

STATEMENT OF THE CASE

A. Facts

In November, 1980, the voters of the State of Washington enacted Initiative Measure No. 383 ("383") prohibiting the

transportation and storage within Washington of radioactive waste produced outside the state. 684 F.2d at 629. Initiative 383 set forth findings, not challenged in the district court, that "radioactive wastes are highly dangerous, in that releases of radioactive materials and emissions into the environment are inimical to the health and welfare of the people of the State of Washington, and contribute to the occurrences of harmful diseases." 383, § 1(1).

Further findings in 383 establish that transportation and storage of radioactive wastes present a hazard to health and safety because of the ever-present risk of accident, § 1(2); that these hazards are magnified both by the long time that the wastes remain radioactive and by the increasing quantities of wastes transported to Washington for storage, § 1(1) and (3); and that accidental releases of radioactive

wastes into the environment may contaminate the air and water. § 1(4).

Ninety five percent of low-level waste stored in Washington originates in other states. 684 F.2d at 629.[2]

At the time of judgment below there were three commercial sites available in the United States for storage of low-level radioactive waste. These sites were Barnwell, South Carolina; Beatty, Nevada; and Richland, Washington. See United States Department of Energy, (Draft) Low-Level Radioactive Waste Management Report at 13-24 (Apr. 21, 1981) (this report ("DOE Report") was included in the

---

[2]Initiative 383 exempted from the scope of the prohibitions described above "medical waste", in recognition of the great benefits derived from the application of nuclear technology to the field of medicine, and the comparatively low risk accompanying wastes generated in such research. 383, §§ 2(2), 3 & 4. Also exempted are wastes stored pursuant to interstate compacts "for the regional storage of radioactive wastes." 383, § 6. A Northwest compact has been submitted to Congress for ratification. 684 F.2d at 630.

district court record). Three other sites which in the past were used for storage of low-level wastes had been closed. Id. Two of these sites have experienced problems with leaching of radioactive wastes and contamination of the environment. Id. at 15, 23-24. Concerns that similar leaching will contaminate the Columbia River were a major consideration in enactment of 383.

Subsequent to the Ninth Circuit's opinion, the Nevada Board of Health ordered the closing of the Beatty site within thirty days. This action leaves Richland as the only commercial waste site in the western United States. Previously, both Beatty and Barnwell had begun to limit the quantities of wastes accepted. DOE Report at 17, 21-22.

Only Richland continues as a site for unlimited storage. However, Governor Ray was required to close the Richland facility

temporarily in 1979 due to shippers' non-compliance with packaging and transportation regulations. DOE Report at 18. Similar action was required by the Governor of Nevada at the same time. Id. at 22.

B. Proceedings Below

On March 27, 1981, US Ecology, Inc., the operator of the low-level waste site at Richland, together with seven other plaintiffs filed suit under 28 U.S.C. §§ 1331 and 1337 seeking a declaration that 383 was unconstitutional. Shortly thereafter, the United States of America filed a similar suit, invoking 28 U.S.C. § 1345. The Governor of Washington and state officials charged with inspecting radioactive waste shipments and supervising the Richland site were named as defendants.

On May 15, 1981, petitioner filed timely motions to intervene in both actions. The district court denied the

motions "without prejudice" but allowed petitioner to appear as amicus curiae.

Plaintiffs in both actions filed motions for summary judgment, supported by affidavits, statements of material facts, and memoranda. The state defendants filed no affidavits or other evidence, instead stipulating to the facts submitted by plaintiffs.

The district court issued a memorandum decision granting summary judgment on June 26, 1981, holding that 383 violated both the Commerce and Supremacy Clauses. 518 F. Supp. 928. Petitioner and the State appealed to the Ninth Circuit, which consolidated the cases and expedited the hearing at petitioner's request. The Ninth Circuit ruled that the district court erred in denying petitioner's motion to intervene, 684 F.2d at 629-30, but affirmed the district court's decision on the merits. Id. at 630-32.

ARGUMENT IN SUPPORT OF PETITION

A. 383 is a Health and Safety Measure Consistent with the Commerce Clause

This petition presents an important question of constitutional law reserved by this Court's decision in Philadelphia v. New Jersey, 437 U.S. 617 (1978). There, the Court struck down a New Jersey statute closing scarce and valuable landfill space to out-of-state users, stating:

> There has been no claim here that the very movement of waste into or through New Jersey endangers health, or that waste must be disposed of as soon and as close to its point of generation as possible.

Id. at 629.

Washington voters explicitly determined, in findings not challenged below, that radioactive wastes are "highly dangerous," and the ever-present risk of accident posed by transportation and storage presents a serious hazard to health, safety and environment. 383, §§ 1(1), (2) & (4).

This case therefore poses the question not answered in Philadelphia v. New Jersey, whether the Commerce Clause precludes state prohibitions deemed essential to health and safety. In contrast to New Jersey's efforts to preserve a scarce resource for its own citizens, Washington has acted against its own economic interests by limiting waste disposal for health and safety purposes. Indeed, the State, which leases the Richland site to US Ecology and collects substantial user fees and business taxes from operation of the site, 684 F.2d at 629, submitted no evidence in defense of 383.

The court of appeals clearly erred in dismissing the stated health and safety justifications in 383 as a mere "incantation" entitled to no deference. 684 F.2d at 631. The burden was on those challenging 383 to demonstrate that the asserted safety justifications were illusory. See

Raymond Motor Transportation, Inc. v. Rice, 434 U.S. 429, 443 (1978); Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 585 (1978) (fundamental policy questions resolved in legislative process are not subject to reexamination in federal courts).

In accepting respondents' contention that 383 was impermissible "economic isolationism," 684 F.2d at 631, the court of appeals failed to recognize that 383 is contrary to the state's economic interests. The validity of legislation excluding "highly dangerous" wastes whose "very movement . . . endangers health" requiring disposal "as close to its point of generation as possible" was reserved for another day in Philadelphia v. New Jersey.

The serious dangers presented by radioactive wastes are compounded by the absence of an adequate waste disposal technology and policy to cope with the ever

increasing quantities of the wastes. See Pacific Legal Foundation v. State Energy Resources Conservation & Development Comm'n, 659 F.2d 903 (9th Cir. 1981), cert. denied, 102 S. Ct. 2959 (1982); Lucas, Nuclear Waste Management: A Challenge to Federalism, 7 Ecol. L.Q. 917, 917-18 & nn. 1-4 (1979); Tribe, California Declines the Nuclear Gamble: Is Such a State Choice Preempted?, 7 Ecol. L.Q. 679, 709 (1979).

While ninety five percent of radioactive waste in Washington originates from other states, forty eight other states now refuse to provide storage for any wastes. Lucas, supra at 919 & n.6; DOE Report at 13-24. This abdication of responsibility by the other states has left Washington as the major recipient of radioactive wastes in the nation, thereby magnifying the risk to health, safety, and environment in Washington.

Under these circumstances, an absolute ban on transportation and storage of radioactive wastes would have been amply justified. However, in contrast to most other states, Washington recognized its responsibility to manage the wastes generated within the state, a responsibility confirmed subsequently by Congress. 42 U.S.C. § 2021d(a)(1)(A). Again acting in advance of congressional policy, Washington provided for regional storage of wastes as an appropriate alternative to separate management in each of the fifty states. See 383, § 6; 42 U.S.C. § 2021d(a)(1)(B).

The effect of the decisions below is to require Washington to accept low-level waste solely because it already has a waste site. The decision appears to excuse other states from sharing the risks and burdens. The Commerce Clause does not require a state to stand by helplessly as these risks increase. In effect, the courts below

have penalized Washington for refusing to join 48 other states in abdicating their responsibility.

This Court has recognized that a state may exclude articles whose "worth in interstate commerce was far outweighed by the dangers inhering in their very movement." Philadephia v. New Jersey, supra at 622. The practical effect of state legislation is "the principal focus of inquiry" in determining whether such legislation impermissibly burdens interstate commerce. Lewis v. BT Investment Managers, Inc., 447 U.S. 27, 35-37 (1980). Respondents failed entirely to demonstrate that 383 will have more than an incidental impact on interstate commerce. No evidence was offered to show that low-level waste can be stored only in Washington.

Instead, respondents speculated that 383 will hinder the development and use of nuclear power. This assertion, wholly

unsupported by the record below, is at odds with the nuclear industry's contention that waste management issues are unrelated to the use of nuclear technology. Lucas, supra at 918. Behind respondents' inconsistent position is a desire to defer development of a national waste management policy solely at the risk of Washington residents.

This Court has employed a balancing approach in Commerce Clause cases, upholding state laws which serve a "legitimate local purpose" and employ the least discriminatory means available to achieve that purpose. Hughes v. Oklahoma, 441 U.S. 332, 336 (1979). The Court has recognized that safety is the highest purpose a state can assert as a counterbalance to a burden on interstate commerce. Raymond Motor Transportation, Inc. v. Rice, supra at 443; Hughes v. Oklahoma, supra at 337.

Where intended safety benefits are not illusory or insubstantial, federal courts must defer to the state's lawmakers on the appropriate balance to be struck against other interests. Kassel v. Consolidated Freight Corp., 101 S. Ct. 1309, 1321 (1981) (Brennan, J., with Marshall, J., concurring in the judgment); Minnesota v. Cloverleaf Creamery Company, 101 S. Ct. 715, 724-25 (1981). The courts below failed to give any deference to Washington's lawmakers' efforts to protect against the dangers of radioactive wastes. E.g., 518 F. Supp. at 934.

Washington has accepted responsibility for its own wastes, consistent with federal policy, 42 U.S.C. § 2021d(a)(1)(A), has made the Richland site available for regional storage, and will continue to accept wastes generated in medical research from any part of the country. Initiative 383 reflects the state's judgment as to the

least discriminatory means available to protect its citizens against the "ever-present risk" of nuclear accident. 383, § 1(2) & (4).

B. 383 is Not Preempted by Federal Law

The court of appeals departed from this Court's standards by implying preemption of 383 in the Low-Level Waste Policy Act, 42 U.S.C. §§ 2021b-d. Implied preemption is disfavored as an invitation to Congress to avoid making difficult political decisions in reliance on the courts. Such decisions are not the proper role of the courts. See Tribe, supra at 690.

The Low-Level Radioactive Waste Policy Act, 42 U.S.C. §§ 2021b-d, enacted one month after 383, is Congress' most specific and most recent legislation addressing low-level wastes. The act established federal policy:

> (A) each State is responsible for providing for the availability of capacity either within or outside the State for the disposal of low-level radioactive waste generated within its borders except for waste generated as a result of defense activities of the Secretary or Federal research and development activities; and
>
> (B) low-level radioactive waste can be most safely and efficiently managed on a regional basis.

The Low-Level Waste Act encouraged formation of interstate compacts for regional waste management, 42 U.S.C. § 2021d(a)(2)(A), while planning for "interim storage" of commercial wastes at federal sites. Id. § 2021d(b)(1)(D).

Washington is one of the only states actively carrying out the federal policy of providing capacity for its own waste, having sub-leased and licensed the Richland site. 684 F.2d at 629. Washington also pioneered regional management through the Northwest compact, id. at 630, thereby fulfilling the second stated federal policy.

The Act confirmed Congress' respect for state authority to exclude low-level waste by planning for interim storage of commercial waste at federal faciliites. 42 U.S.C. § 2021d(b)(1)(D). The Act's legislative history clearly confirms this intent.

The clearest expression of congressional intent was the explicit confirmation by Senator McClure, a co-sponsor of the Low-Level Waste Act, that the Act would not require states to accept wastes from other states. 126 Cong. Rec. S16543 (Dec. 13, 1980). Senator Thurmond confirmed Congress' understanding of the existing federal-state relationship. After referencing the recent enactment of 383 in Washington, the Senator stated:

> I wish to leave the responsibility for handling this problem where it rightfully belongs -- with the individual states.

Id. at S16544. See also 126 Cong. Rec. H12496 (Dec. 13, 1980) (House co-sponsor characterizing recent actions by site states including 383 as "responsible").

Had Congress intended preemption in its most specific and recent act addressing low-level wastes, it surely would have done more than tell the states to find storage capacity. Senate leaders believing the field already preempted would not "leave the responsibility . . . with the individual States." Nor would a co-sponsor of preemptive legislation provide the confirmation requested by a colleague that his state could prohibit "another State in another part of the country from putting its waste within that State." 126 Cong. Rec. S16543 (Dec. 13, 1980).

The finding of preemption by the courts below is contrary to the principles of federalism established by this Court's decisions. State laws are preempted only

if there is an "irreconcilable conflict" with federal law, or where the "clear and manifest purpose of Congress" to preempt is evident. Florida Lime & Avocado Growers v. Paul, 383 U.S. 132, 146 (1963). Preemption is not to be inferred merely from the existence of comprehensive federal law in the field. New York State Department of Social Services v. Dublino, 413 U.S. 405, 415 (1973). The Court has stated:

> Only a demonstration that complete ouster of state power--including state power to promulgate laws not in conflict with federal laws--was "the clear and manifest purpose of Congress" would justify that conclusion.

DeCanas v. Bica, 424 U.S. 351, 357 (1976). See also Pacific Legal Foundation, supra (state laws "zoning" nuclear power plants upheld).

The principle that preemption will not be presumed lightly is especially forceful in its application to state health and

safety laws. Brotherhood of Locomotive Engineers v. Chicago, Rock Island, & Pacific R.R., 383 U.S. 423 (1966). See also Philadelphia v. New Jersey, supra at 620-21 n.4 (declining to find preemption in management of solid wastes); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) (recognizing historical police power in fields traditionally occupied by the state).

This policy of judicial restraint recognizes the ultimate authority of Congress to establish the federal-state balance, while preserving essential state authority to the extent consistent with federal law. The courts below cut off state authority clearly in advance of congressional resolution of the issue.

CONCLUSION

The courts below have deprived Washington of its power to exclude dangerous substances, extending application of the Commerce Clause to wastes whose very movement endanger health. Their decision invaded Congress' authority to delineate state and federal roles in low-level waste management. The courts have answered questions reserved for Congress, and may well have reached a result opposite from that intended by Congress.

The Court should grant the petition and address the important constitutional issues raised by the state's efforts to address a too long ignored critical health and safety issue.

DATED this ___ day of November, 1982.

Respectfully submitted,
BRICKLIN & GENDLER

MICHAEL W. GENDLER
Counsel of Record for Petitioner
Don't Waste Washington Legal
Defense Foundation

APPENDIX

The Constitution of the United States reads in pertinent part:

Article I, Section 8:

> The Congress shall have Power ***
>
> To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes:

Article VI.

> This Constitution, and the laws of the United States which shall be made in Pursuance thereof, and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Low-Level Radioactive Waste
Policy Act
Title 42 U.S.C.

Sec. 2, As used in this Act--

(2) The term "low-level radioactive waste" means radioactive waste not classified as high-level radioactive waste, transuranic waste, spent nuclear fuel, or byproduct material as defined in section 11e.(2) of the Atomic Energy Act of 1954.

LOW-LEVEL RADIOACTIVE WASTE DISPOSAL

Sec. 4. (a)(1) It is the policy of the Federal Government that--

(A) each State is responsible for providing for the availability of capacity either within or outside the State for the disposal of low-level radioactive waste generated within its borders except for waste generated as a result of defense activities of the Secretary

or Federal research and development activities; and

(B) low-level radioactive waste can be most safely and efficiently managed on a regional basis.

(2)(A) To carry out the policy set forth in paragraph (1), the States may enter into such compacts as may be necessary to provide for the establishment and operation of regional disposal facilities for low-level radioactive waste.

(B) A compact entered into under subparagraph (A) shall not take effect until the Congress has by law consented to the compact. Each such compact shall provide that every 5 years after the compact has taken effect the Congress may by law withdraw its consent. After January 1, 1986, any such compact may restrict the use of the regional disposal facilities under the compact to the disposal of

low-level radioactive waste generated within the region.

(b)(1) In order to assist the States in carrying out the policy set forth in subsection (a)(1), the Secretary shall prepare and submit to Congress and to each of the States within 120 days after the date of the enactment of this Act a report which--

(A) defines the disposal capacity needed for present and future low-level radioactive waste on a regional basis;

(B) defines the status of all commercial low-level radioactive waste disposal sites and includes an evaluation of the license status of each such site, the state of operation of each site, including operating history, an analysis of the adequacy of disposal technology employed at each site to contain

low-level radioactive wastes for their hazardous lifetimes, and such recommendations as the Secretary considers appropriate to assure protection of the public health and safety from wastes transported to such sites;

(C) evaluates the transportation requirements on a regional basis and in comparison with performance of present transportation practices for the shipment of low-level radioactive wastes, including an inventory of types and quantities of low-level wastes, and evaluation of shipment requirements for each type of waste and an evaluation of the ability of generators, shippers, and carriers to meet such requirements; and

(D) evaluates the capability of the low-level radioactive waste

disposal facilities owned and operated by the Department of Energy to provide interim storage for commercially generated low-level waste and estimates the costs associated with such interim storage.

(2) In carrying out this subsection, the secretary shall consult with the Governors of the States, the Nuclear Regulatory Commission, the Environmental Protection Agency, the United States Geological Survey, and the Secretary of Transportation, and such other agencies and departments as he finds appropriate.

COMPLETE TEXT OF
Initiative Measure 383

AN ACT Relating to radioactive waste; prohibiting the storage of certain radioactive waste in Washington state; creating a new chapter in Title 70 RCW; and providing penalties.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF WASHINGTON:

NEW SECTION. Section 1. The people of the state of Washington find that:

(1) Radioactive wastes are highly dangerous, in that releases of radioactive materials and emissions to the environment are inimical to the health and welfare of the people of the state of Washington, and contribute to the occurrences of harmful diseases, including excessive cancer and leukemia. The dangers posed by the transportation and presence of radioactive wastes are increased further by the long time periods that the wastes remain radioactive and highly dangerous;

(2) Transporting, handling, storing, or otherwise caring for radioactive waste presents a hazard to the health, safety, and welfare of the individual citizens of the state of Washington because of the ever-present risk that an accident or incident will occur while the wastes are being cared for;

(3) The likelihood that an accident will occur in this state involving the release of radioactive wastes to the environment becomes greater as the volume of wastes transported, handled, stored, or otherwise cared for in this state increases;

(4) The effects of unplanned releases of radioactive wastes into the environment, especially into the air and water of the state, are potentially both widespread and harmful to the health, safety, and welfare of the citizens of this state.

The burden and hazards posed by increasing the volume of radioactive wastes transported, handled, stored, or otherwise cared for in this state by the importation of such wastes from outside this state is not a hazard the state government may reasonably ask its citizens to bear. The people of the state of Washington believe that the principles of federalism do not require the sacrifice of the health, safety, and welfare of the people of one state for the convenience of other states or nations.

NEW SECTION. Sec. 2. The definitions set forth in this section apply throughout this chapter.

(1) "Radioactive waste" means unwanted radioactive material, including radioactive residues produced as a result of electric power generation or other reactor operation.

(2) "Medical waste" means radioactive waste from all therapy, diagnosis, or research in medical fields and radioactive waste which results from the production and manufacture of radioactive material used for therapy, diagnosis, or research in medical fields, except that "medical waste" does not include spent fuel or waste from the fuel of an isotope production reactor.

(3) "Radioactive waste generated or otherwise produced outside the geographic boundaries of the state of Washington" means radioactive waste which was located outside the state of Washington at the time of removal from a reactor vessel.

NEW SECTION. Sec. 3. Notwithstanding any law, order, or regulation to the contrary, after July 1, 1981, no area within the geographic boundaries of the state of Washington may be used by any person or entity as a temporary, interim, or permanent storage site for radioactive

waste, except medical waste, generated or otherwise produced outside the geographic boundaries of the state of Washington. This section does not apply to radioactive waste stored within the state of Washington prior to July 1, 1981.

NEW SECTION. Sec. 4. Notwithstanding any law, order, or regulation to the contrary, after July 1, 1981, no person or entity may transport radioactive waste, except medical waste, generated or otherwise produced outside the geographic boundaries of the state of Washington to any site within the geographic boundaries of the state of Washington for temporary, interim, or permanent storage.

NEW SECTION. Sec. 5. (1) A violation of or failure to comply with the provisions of section 3 or 4 of this act is a gross misdemeanor.

(2) Any person or entity that violates or fails to comply with the provisions of

sections 3 or 4 of this act is subject to a civil penalty of one thousand dollars for each violation or failure to comply.

(3) Each day upon which a violation occurs constitutes a separate violation for the purposes of subsections (1) and (2) of this section.

(4) Any person or entity violating this chapter may be enjoined from continuing the violation. The attorney general or any person residing in the state of Washington may bring an action to enjoin violations of this chapter, on his or her own behalf and on the behalf of all persons similarly situated. Such action may be maintained in the person's own name or in the name of the state of Washington. No bond may be required as a condition to obtaining any injunctive relief. The superior courts have jurisdiction over actions brought under this section, and venue shall lie in the county of the

plaintiff's residence, in the county in which the violation is alleged to occur, or in Thurston county. In addition to other relief, the court in its discretion may award attorney's and expert witness fees and costs of the suit to a party who demonstrates that a violation of this chapter has occurred.

NEW SECTION. Sec. 6. Notwithstanding the other provisions of this chapter, the state of Washington may enter into an interstate compact, which will become effective upon ratification by a majority of both houses of the United States Congress, to provide for the regional storage of radioactive wastes.

NEW SECTION. Sec. 7. This chapter shall be liberally construed to protect the health, safety, and welfare of the individual citizens of the state of Washington.

NEW SECTION. Sec. 8. If any provision of this act or its application

to any person or circumstances is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

NEW SECTION. Sec. 9. This act may be known as the Radioactive Waste Storage and Transportation Act of 1980.

NEW SECTION. Sec. 10. Sections 1 through 9 of this act shall constitute a new chapter in Title 70 RCW.

WASHINGTON STATE BUILDING AND CONSTRUCTION TRADES COUNCIL, AFL-CIO, et al., Plaintiffs-Appellees,

v.

The Honorable John C. SPELLMAN, Governor of the State of Washington, et al., Defendants-Appellants.

UNITED STATES of America, Plaintiff-Appellee,

v.

STATE OF WASHINGTON, et al., Defendants-Appellants.

WASHINGTON STATE BUILDING AND CONSTRUCTION TRADES COUNCIL, AFL-CIO, et al., Plaintiffs-Appellees,

v.

The Honorable John C. SPELLMAN, et al., Defendants,

and

Don't Waste Washington Legal Defense Foundation, Intervenor-Defendant-Appellant.

UNITED STATES of America, Plaintiff-Appellee,

v.

STATE OF WASHINGTON, et al., Defendant,

and

Don't Waste Washington Legal Defense Foundation,
Intervenor-Defendant-Appellant.

Nos. 81-3453, 81-3454, 81-3460 and 81-3461.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted May 5, 1982.
Decided Aug. 17, 1982.

Suit challenging constitutionality of Washington statute prohibiting transportation and storage within state of radioactive waste produced outside state was brought. The United States District Court for the Eastern District of Washington, Robert J. McNichols, Chief Judge, 518 F.Supp. 928, found the statute unconstitutional, and appeal was taken. The Court of Appeals, Goodwin, Circuit Judge, held that the statute violated both the supremacy and the commerce clauses.

Affirmed.

1. Federal Civil Procedure 331

In action challenging constitutionality of Washington statute prohibiting importation of low-level radioactive waste originating outside state, public interest group that sponsored statute as initiative measure was entitled to intervene as matter of right. Fed. Rules Civ. Proc. Rule 24(a), 28 U.S.C.A.

2. States 4.10, 6

Washington statute closing borders of state to entry of low-level radioactive waste orginating outside state violated supremacy clause since it sought to regulate legitimate federal activity of disposing of such waste and since statute was not authorized by federal law permitting establishment and operation of regional disposal facilities through interstate compacts because it was not framed in terms of compact and because compact had not been

approved by Congress. U.S.C.A. Const. Art. 6, cl. 2; Atomic Energy Act of 1954, § 274, 42 U.S.C.A. § 2021; Low-Level Radioactive Waste Policy Act, § 2 et seq., 42 U.S.C.A. § 2021b et seq.

3. Commerce 52.10, 61(1)

Washington statute prohibiting transportation and storage within state of radioactive waste produced outside state was unconstitutional as violation of commerce clause since Congress had established pervasive statutory scheme to regulate nuclear activity. U.S.C.A. Const. Art. 1, § 8, cl. 3; Atomic Energy Act of 1954, § 274, 42 U.S.C.A. § 2021; Low-Level Radioactive Waste Policy Act, § 2 et seq., 42 U.S.C.A. § 2021b et seq.

4. Commerce 12

Even in absence of pervasive federal legislation, commerce clause prevents states from erecting barriers to free flow

of interstate commerce. U.S.C.A. Const. Art. 1, § 8, cl. 3.

5. Commerce 12

State statute may affect commerce without violating commerce clause if statute serves legitimate state interest and if it is applied in nondiscriminatory manner. U.S.C.A. Const. Art. 1, § 8, cl. 3.

6. Commerce 13.4, 54

Criteria for determining whether commerce clause has been violated is whether state law regulates evenhandedly, accomplishes legitimate local public purpose, and has only incidental effect on interstate commerce. U.S.C.A. Const. Art. 1, § 8, cl. 3.

Michael B. Crutcher, Seattle, Wash., argued for Washington State Bldg. et al., W. Russell Daggatt, Catherine B. Roach,

Roberta R. Katz, Preston, Thorgrimson, Ellis & Holman, Seattle, Was., on brief.

Michael Hanbey, Asst. Atty. Gen., Olympia, Wash., argued for Spellman, et al.; Kenneth O. Eikenberry, Atty. Gen., Kenneth M. MacIntosh, Asst. Atty. Gen., Olympia, Wash., on brief.

Michael W. Gendler, Seattle, Wash. for amicus curiae.

Appeal from the United States District Court for the Eastern District of Washington.

Before GOODWIN and POOLE, Circuit Judges, and EAST*, District Judge.

GOODWIN, Circuit Judge

The district court granted summary judgment in favor of the United States and certain commercial users of a low-level

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*The Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

radioactive waste disposal site in the State of Washington. The decision, reported at 518 F.Supp. 928 (E.D. Wash. 1981), struck down as unconstitutional a Washington statute closing the borders of Washington to the entry of low-level radioactive waste originating outside the state. Don't Waste Washington (DWW), a public interest group which had sponsored the challenged initiative legislation, appeals the denial of leave to intervene as a party. The State appeals the summary judgment.

For more than fifteen years, the State of Washington has leased from the United States 1,000 acres in an area known as the Hanford Reservation. During this time, the State has sub-leased part of the land for use as a commercial low-level radioactive waste dump. By arrangement with the United States under § 274 of the Atomic Energy Act (42 U.S.C. § 2021), Washington monitors the

dumping site (Richland) and inspects shipments of waste to determine their compliance with state and federal regulations concerning radioactive material. The State also licenses users and collects a fee from them.

Richland is one of three low-level radioactive dump sites in operation nationwide and receives about 40 percent of the country's low-level radioactive waste. It is also the only currently operating site accepting absorbed-liquid low-level radioactive waste. Approximately 95 percent of the waste received bv Richland originates outside the State of Washington.

In November 1980, the voters of the State of Washington enacted Initiative Measure No. 383 ("383") prohibiting the transportation and storage within Washington of radioactive waste produced outside the state. The initiative also gave permission for the state to enter into an

interstate compact to solve the problem of radioactive waste on a regional basis. Federal legislation had already provided for military and high level radioactive wastes.

After the Washington initiative was approved by the voters, Congress passed the Low-Level Radioactive Waste Policy Act of 1981 (Pub.L. No. 96-573, 94 Stat. 3347, hereinafter referred to as the "Low-Level Waste Act") encouraging the use of compacts between and among states to accomplish regional storage of low-level radioactive waste. At the time the Low-Level Waste Act was passed, Congress was aware of the enactment of 383 in Washington.

The operator of the site, together with seven other plaintiffs, filed an action in district court seeking a declaration that 383 was unconstitutional and requesting injunctive relief. Shortly

afterward, the United States of America filed a similar action.

The parties concede that regulation of the disposal of high-level radioactive waste has been preempted by the federal government and that this area is therefore not susceptible to regulation by the states. The dispute concerns the power of a state to regulate within its borders the importation and disposal of low-level radioactive waste such as filter sludges, resins, filter bottoms, used gloves and protective clothing, rags, tools, papers, plastic and material used in the manufacture of smoke detectors, luminous dials and emergency exit signs.

The government and the users of the Richland site attack the state statute on two grounds: (1) the Atomic Energy Act and the Low-Level Waste Act preempt state action; and (2) Measure 383 violates the Commerce Clause of the United States

Constitution. The State of Washington contends that § 274 of the Atomic Energy Act and the interstate compact provision of the Low-Level Waste Act cede control to the state over low-level waste disposal in general. The State also argues that 383 does not violate the Commerce Clause.

[1] DWW appeals the district court's denial of its motion to intervene either as a matter of right under Federal Rules of Civil Procedure 24(a), or under Rule 24(b)'s provision for permissive intervention.

Denial of DWW's motion to intervene was error and accordingly we reverse as to that holding. Rule 24 traditionally has received a liberal construction in favor of applicants for intervention. 7A C. Wright & A. Miller, Federal Practice and Procedure § 1904 (1972). DWW, as the public interest group that sponsored the initiative,

was entitled to intervention as a matter of right under Rule 24(a). However, while we sustain DWW's appeal, this reversal does not require a new trial because the holding of the case would not be changed. DWW was permitted to participate in the argument on the appeal from the order granting summary judgment, and its contentions were duly considered. We conclude that the district court was correct in granting summary judgment to the plaintiffs. No genuine issue of fact exists. Initiative 383 violates the Supremacy Clause and the Commerce Clause of the United States Constitution.

1. Supremacy Clause

[2] The initiative violates the Supremacy Clause because it seeks to regulate legitimate federal activity and to avoid the preemption of the Atomic Energy Act. Neither § 274 of the Act nor the

Low-Level Waste Act is a grant of total authority to the states over the disposal of low-level wastes within their own borders.

The regulation of the disposal of low-level radioactive waste is a legitimate federal activity, and Congress has not waived or delegated its authority over the subject. The United States' § 274 agreement with the State of Washington gives the State authority over such matters as licensing, inspection, and levying of lease and maintenance fees. However, as the district court correctly points out, complete control of the Richland site did not pass with the assignment of regulatory responsibilities.

The Low-Level Waste Act comes closer to yielding control of disposal sites to the states in which the sites are located. The Act permits the establishment and operation of regional disposal facilities

through interstate compacts. Because Congress specifically gives permission for regional disposal in this Act, states signatory to a compact could exclude waste from nonsignatory states without violating the Supremacy or Commerce Clauses. Permission to exclude such wastes, however, is conditioned on participation in a compact.

The State of Washington has signed the proposed Northwest Interstate Compact on Low-Level Radioactive Waste Management (Northwest Compact) with Oregon, Idaho, Montana and Utah. As of this date, the proposed compact has not received Congressional approval. Until the state participates in a compact which has become law, the Low-Level Waste Act does not grant power to any state to close its borders to interstate traffic in low-level waste.

In any case, Initiative 383 was not framed in terms of the Northwest Compact. It was an unqualified closing of the

Richland facility to all out-of-state users. As such, it violates the Supremacy Clause.

II. Commerce Clause

[3] Initiative 383 also violates the Commerce Clause. The initiative is based upon an impermissible exercise of the State of Washington's police powers. Congress has established in the Atomic Energy Act a pervasive statutory scheme to regulate nuclear activity. As discussed above, through § 274 of the Act and through the Low-Level Waste Act, Congress has also ceded some regulatory authority to the states. But Congress stopped short of granting the states power to ban wastes transported from outside their borders.

[4,5] Even in the absence of pervasive federal legislation, "the Commerce Clause prevents the States from erecting barriers to the free flow of interstate commerce." Raymond Motor Transportation, Inc. v. Rice,

434 U.S. 429, 440, 98 S.Ct. 787, 54 L.Ed.2d 664 (1978). A state statute may affect commerce without violating the Commerce Clause, however, if the statute serves a legitimate state interest and if it is applied in a nondiscriminatory manner. Id.

[6] The criteria for determining whether the Commerce Clause has been violated are articulated in Pike v. Bruce Church, Inc., 397 U.S. 137, 142, 90 S.Ct. 844, 847, 25 L.Ed.2d 174 (1970). The Pike test asks whether the state law (1) regulates evenhandedly; (2) accomplishes a legitimate local public purpose; and (3) has only an incidental effect on interstate commerce.

Low-level waste from within Washington and that traveling through the state are exempted from the initiative. Only out-of-state waste bound for disposal with Washington is banned. Such uneven treatment of

in-state and out-of-state parties fails the first part of the Pike test.

This facial discrimination, in turn, "invokes the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatoary alternatives." Hughes v. Oklahoma, 441 U.S. 322, 337, 99 S.Ct. 1727, 1737, 60 L.Ed.2d 250 (1979). The initiative cannot withstand this level of scrutiny.

A challenge to bona fide safety regulations must overcome a strong presumption of validity. Bibb v. Navajo Freight Lines, 359 U.S. 520, 524, 79 S.Ct. 962, 964, 3 L.Ed.2d 1003 (1959). However, the Supreme Court has recently held that "the incantation of a purpose to promote the public health or safety does not insulate a state law from Commerce Clause attack." Kassel v. Consolidated Freightways Corp., 450 U.S. 662, 670, 101 S.Ct. 1309, 1316, 67 L.Ed.2d 580 (1981).

The state relies upon the proposition that "releases of radioactive materials and emissions to the environment are inimical to the health and welfare of the people of Washington . . . ." Initiative 383, § 1. Undoubtedly, the release of radioactive materials and emissions is inimical to the safety of the people of any state. The State of Washington neglects to address, however, the manner in which local waste, transported and stored within Washington has superior safety and environmental virtues over waste produced elsewhere and similarly controlled by state regulatory measures. Initiative 383, therefore, also fails the second part of the Pike test.

Finally, Initiative 383 has more than an incidental effect on interstate commerce. Washington receives two-fifths of the country's low-level radioactive waste and has the only site currently available to receive absorbed-liquid low-level waste.

Closing Washington's borders would significantly aggravate the national problem of low-level waste disposal. Thus, 383 fails to meet the last part of the Pike test and violates the Commerce Clause.

Further, 383 fails to qualify under either the market participant or quarantine theory exceptions to the Commerce Clause. The State's contention that it is a "market participant," thereby placing the initiative beyond the reach of the Commerce Clause, is unconvincing. The State argues that 383 is a proprietary measure enacted to limit the state's participation in the waste disposal market. Whether or not the State is a proprietor of the Richland site, the initiative is cast in state regulatory rather than in proprietary terms. The measure is based on public safety rather than on economic considerations. The measure denies entry of waste at the state's borders rather than at the site the

State is operating as a market participant. The measure establishes civil and criminal penalties which only a state and not a mere proprietor can enforce.

The State's quarantine theory is equally unconvincing. Under the quarantine theory, a state may close its borders to protect citizens against health hazards such as epidemics.

In Philadelphia v. New Jersey, 437 U.S. 617, 98 S.Ct. 2531, 57 L.Ed.2d 475 (1978), however, the Supreme Court held that one state may not "isolate itself from a problem common to many by erecting a barrier against the movement of interstate trade." Id. at 628, 98 S.Ct. at 2538. In that case, the out-of-state user of a New Jersey disposal site challenged a New Jersey statute prohibiting the importation of out-of-state waste. The New Jersey statute, like the Washington initiative, protected the health of the individual

MEMORANDUM DECISION

ROBERT J. McNICHOLS, Chief Judge.

The plaintiffs in these cases challenge the constitutionality of Washington's Radioactive Waste Storage and Transportation Act Measure No. 383 (Initiative). Since the plaintiffs' motions for summary judgment rest on substantially similar grounds, their motions were joined for purposes of argument.

One of the plaintiffs, U.S. Ecology, Inc. operates one of the three active commercial nuclear waste disposal sites in the United States. It provides disposal services to the United States, various state governments and numerous commercial users throughout the country. The United States, in addition to being a substantial user of the commercial facility, also maintains its own disposal sites in Washington.

The defendant (State) by the Initiative, seeks to effectively ban the storage of all non-medical radioactive waste (waste) generated outside the State of Washington. The Initiative also bans the transportation of such waste to any storage site in Washington. The stated purpose of the Initiative was to protect the health and safety of the citizens of Washington. Although the State contends that the provision in the Initiative for an interstate compact might remove any impermissible ban on interstate commerce, the Initiative Compact Section does not provide a timely or effective exception to the ban.

The Initiative does not ban the transportation for storage or the storage of waste generated in Washington. Nor does it ban the transportation of radioactive material through Washington for use or

storage elsewhere. Consequently, the Initiative suggests that the perceived harms caused by the waste occur after its disposal in the storage sites.

The plaintiffs jointly contend that the Initiative violates the Commerce Clause, U.S.Const., Art. 1, § 8, cl. 3 and that under the Supremacy Clause, U.S. Const., Art. VI, cl. 2, it has been pre-empted by federal law. (Atomic Energy Act, 42 U.S.C. §§ 2011 et seq.; Low-Level Radioactive Waste Policy Act, Pub.L.No. 96-573 (Dec. 23, 1980); Hazardous Materials Transportation Act, 49 U.S.C. §§ 1801 et seq.). In addition, the United States contends that the Initiative violates the War Power and Property Clauses of the United States Constitution. With respect to the Commerce Clause, the State contends that the Initiative is valid as an action of a market participant or as a proper exercise of the State's police powers.

With respect to the Supremacy Clause, the State contends that the Initiative has not been preempted by federal law. I hold that the Initiative is unconstitutional and thus not enforceable.

FACTS

This controversy centers on the transportation to and storage of nuclear waste on the Hanford Reservation. This federal reservation consists of 562 square miles of land and facilities in and around Benton County, Washington. Since 1943, the reservation has been used for federal nuclear programs.

There are three storage areas on the reservation. The first two areas are owned and operated by the federal government. The first area provides storage for waste generated from federal energy programs and national defense activities. The second area contains a near-surface test facility

which is designed to test the feasibility of storing spent fuel and high-level waste in underground basalt formations. The third area arose out of a lease of approximately 1000 acres by the United States to the State of Washington. The State of Washington subleased approximately 100 of those acres to U.S. Ecology, Inc. for the operation of a low-level radioactive waste storage facility. Although there are two other active commercial facilities in the United States, the U.S. Ecology, Inc. site is the only existing commercial facility which can store absorbed low-level radioactive liquids.

The commercial site is licensed for its current activity by the State of Washington. The site is regulated under State and Federal regulations pertaining to atomic energy and health and environmental

protection. The United States Department of Transportation regulates the transportation of the radioactive waste.

The low-level radioactive waste problem is of national concern. S.Rep. No. 548, 96th Cong. (1980), reprinted in U.S.Code Cong. & Ad. News 11230. The latest Department of Energy statistics indicate commercial facilities generated over three million cubic feet of low-level waste in 1980. Low-Level Radioactive Waste Management Report (Draft Report, April 21, 1981). By 1985, the figure is expected to increase to over five and a half million cubic feet per year. Id.

The commercial storage facility on the Hanford Reservation is a key facility in the nation's waste disposal program. Specifically, it is the only commercial storage site which can store "absorbed low-level radioactive liquids." Moreover,

it accepted approximately twenty-seven percent (27%) of the total waste in 1980. While a site in Barnwell, South Carolina has been accepting more than fifty percent (50%) of the generated waste, a South Carolina "volume limitation program" will cut that site's capacity to less than twenty-five percent (25%) of the waste generated in 1985.

The facts of this case present a classic supply and demand problem. It is clear that there is a serious national problem with the increasing volume of waste, which must be stored somewhere, and a nearly simultaneous reduction of the already limited storage capacity. Congress has recognized this problem and taken steps to solve it to the end that a few states will not continue to bear the waste of many. If the Initiative were permitted to stand it would aggravate an already critical situation.

DISCUSSION

The Initiative is invalid for two reasons: it violates the Supremacy Clause and the Commerce Clause of the United States Constitution.

[1,2] The Initiative violates the Supremacy Clause because it seeks to regulate legitimate federal activity, and because it has been preempted by federal law.

If the Initiative seeks to regulate the transportation for storage and storage of all federal waste generated outside the State of Washington and the operations of the federal storage facility, the Initiative violates the Supremacy Clause. U.S. Const. Art. VI, cl. 2. Since defendants' counsel are unable to represent that the Initiative did not apply against the federal government, I must, in light of the Initiative's clear language, assume that it

does purport to apply to the federal government. Therefore, I am compelled to find that, to the extent that it is applicable to the United States government, the Initiative, in the absence of an express Congressional waiver of sovereignty, is unconstitutional. Hancock v. Train, 426 U.S. 167, 96 S.Ct. 2006, 48 L.Ed.2d 555 (1976); Mayo v. United States, 319 U.S. 441, 63 S.Ct. 1137, 87 L.Ed. 1504 (1943).

The doctrine of federal preemption has its roots in the Supremacy Clause. The issue is whether the federal government has preempted the state regulation of high-level and low-level radioactive wastes.

Since preemption may be demonstrated in either of two ways, my function is to determine: (1) Whether there is evidence (pervasive federal scheme or dominant federal interest) that Congress intended to supersede the police powers of the State,

Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1947) or (2) Whether the Initiative "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Hines v. Davidowitz, 312 U.S. 52, 67, 61 S.Ct. 399, 404, 58 L.Ed. 581 (1941).

By reviewing the pervasive federal statutory schemes for the regulation of radioactive waste, the Atomic Energy Act, the Low-Level Radioactive Waste Policy Act and the Hazardous Materials Transportation Act, and applying established judicial reasoning, I am convinced that Congress intended that the transportation and storage of all materials which pose radiation hazards would be regulated by the federal government except where jurisdiction was expressly ceded to the states. Northern States Power Company v. State of Minnesota, 447 F.2d 1143 (CA 8 1971),

aff'd, 405 U.S. 1035, 92 S.Ct. 1307, 31 L.Ed.2d 576 (1972) (nuclear waste releases); Consolidated Rail Corporation v. City of Dover, 450 F.Supp. 966 (D.Del. 1978) (hazardous freight and toxic materials.)

The State concedes, and the most recent legislative history confirms the fact that Congress has not expressly ceded management of high-level radioactive waste. S.Rep.No. 548, 96th Cong. (1980), reprinted in U.S. Code Cong. & Ad.News 11231. Since it is clear that federal law preempts any state ban on high-level waste, the only remaining issue is whether Congress has expressly ceded regulation of low-level wastes.

In this case, there are two federal expressions which might be interpreted as a grant of such authority: (1) the Agreement between the United States Atomic Energy Commission and the State

of Washington pursuant to Section 274 of the Atomic Energy Act (42 U.S.C. § 2021), and (2) the Low-Level Radioactive Waste Policy Act, Pub.L. No. 96-573 (Dec. 23, 1980).

Although the Section 274 Agreement expressly ceded qualified regulatory responsibility over byproduct materials, source materials and special nuclear materials, it did not cede control over all low-level wastes. Also, the Agreement, by its terms, contemplates "that State and Commission programs for protection against hazards of radiation will be coordinated and compatible." Agreement at p. 2. Moreoever, the Agreement recognizes the desirability of reciprocal recognition of licenses. Agreement at p. 5. Furthermore, Congress granted the authority to regulate certain nuclear material. It did not grant the authority to effectively ban the receipt and disposal of such material.

Finally, the Initiative was expressly based upon the State's police power to protect the health, safety and welfare of the citizens of Washington State. It was not premised on the Section 274 Agreement.

Thus, neither the Agreement nor the statute which authorized it represent an express grant of the authority to the State to effectively ban the storage or transport of low-level radioactive waste.

The Low-Level Waste Policy Act, (Low-Level Act), does constitute a valid but limited grant of authority to effectively ban the storage of certain waste. The Low-Level Act is important for several reasons. First, it clearly excludes federal waste or facilities from any action taken under a regional compact.

Second, the Low-Level Act recognizes the particularly acute national problem of a high demand for storage and a dwindling supply of storage capacity. At the same

time, the Act recognizes that those states (Nevada, South Carolina and Washington) which provide the nation's entire commercial disposal system cannot be expected to continue to bear the burden of the other states' waste problems.

Thirdly, the Low-Level Act presents a rational and equitable approach for resolving the waste disposal problem. Each state is now responsible "for providing for the availability of capacity either within or outside the State" for low-level radioactive waste disposal. Section 4(a)(1)(A). The Low-Level Act recognizes that a regional approach affords the safest and most efficient management. Section 4(a)(1)(B). Congress has authorized the states to join interstate compacts to provide for regional disposal sites. Section 4(a)(2)(A). These compacts are subject to approval by Congress. After January 1, 1986, any such regional compact may preclude disposal of

extra-regional waste in the compact's regional sites. Section 4(a)(2)(B).

The State's argument that Congress, by this statute, ceded complete authority to regulate is not persuasive because the statute merely makes each state "responsible for providing for the availability of capacity."

The State contends that the Federal Low-Level Waste Act does not preclude the State from presently banning the importation of waste. Such an interpretation of the statute is strained. Congress has authorized the State to enter into interstate compacts. After such compacts are approved by Congress, the regions established thereby may exclude waste from without the region after January 1, 1986 or at such other times as Congress may authorize.

A close reading of the statute and the legislative history reveals a Congressional

plan to place future responsibility on the individual states to dispose of their waste. To encourage individual state action, Congress made it clear to all states that if they did not make provision for their own waste by January 1, 1986, they could be denied access to other regions' disposal sites. At the same time, Congress recognized that the organization of regional compacts and construction of disposal sites would take time. Consequently, Congress expressly delayed any authorized ban on radioactive waste until January 1, 1986. If I were to adopt the contentions that Washington may ban waste today, the State of Washington would obstruct the efforts of Congress toward an orderly resolution of a significant national problem.

For the aforementioned reasons, the Initiative cannot withstand scrutiny under the Supremacy Clause.

COMMERCE CLAUSE

The plaintiffs contend that the Initiative violates the Commerce Clause, U.S.Const., Art. 1, § 8, cl. 3, because it discriminates against and interferes with interstate commerce. The State contends that the Initiative does not violate the Commerce Clause because: (1) the interstate movement of radioactive waste, unlike other substances, is not "commerce" within the meaning of the Commerce Clause; (2) the state is acting as a market participant; and (3) the Initiative is based upon a permissible exercise of the state's police powers.

[3] Both a common sense view of the facts and the principle that "[a]ll objects of interstate trade merit Commerce Clause protection; none [are] excluded by definition at the outset[,]" Philadelphia v. New Jersey, 437 U.S. 617, 622, 98

S.Ct. 2531, 2534, 57 L.Ed.2d 475 (1978), (solid or liquid waste), support a determination that the movement of radioactive waste in interstate commerce fits within the definition of "commerce" for constitutional purposes.

[4] The State's contention that the Initiative merely reflects the action of a "market participant" and that as such the Initiative is beyond the reach of the Commerce Clause is not persuasive. The Initiative is not a proprietary measure. The clear language of the Initiative establishes that it is a regulatory measure. It purports to effectively ban the transport for storage and the storage of certain material. It establishes civil and criminal penalties for violations. Moreover, the Initiative is based on a perceived need to protect the health and safety of the citizens of Washington. It is not based on economics or other factors

traditionally associated with proprietary measures. Finally, the State, as a lessor, is engaged in the rental business. The real proprietors are the United States government as an operator of two federal sites and U.S. Ecology, Inc., as the operator of the commercial site. Having determined that the movement of radioactive waste is "commerce" and that the State is not a "market participant", I must now determine whether the Initiative is permissible as an exercise of Washington's police power. I hold that the State of Washington, through the Initiative, has exceeded its police powers.

[5-8] Unlike the situation in South Carolina State Highway Department v. Barnwell Brothers, Inc., 303 U.S. 177, 58 S.Ct. 510, 82 L.Ed. 734 (1938), Congress has established a pervasive statutory scheme, in this case, to regulate nuclear activity. Although Congress has ceded some

of this authority to the states, it has not granted the states the power to effectively ban the transportation for storage or the storage of radioactive waste generated outside Washington. In the presence of such pervasive federal legislation, the Initiative must be invalidated. Campbell v. Hussey, 368 U.S. 297, 82 S.Ct. 327, 7 L.Ed.2d 299 (1961) (supplemental state tobacco regulation).

Even in the absence of federal legislation, "the Commerce Clause prevents the States from erecting barriers to the free flow of interstate commerce." Raymond Motor Transportation, Inc. v. Rice, 434 U.S. 429, 440, 98 S.Ct. 787, 793, 54 L.Ed.2d 664 (1978). However, a state statute which affects commerce does not violate the Commerce Clause if it is designed to serve a legitimate state interest and if it is applied in a nondiscriminatory manner. Id. The court in such

instances must make a "delicate adjustment of the conflicting state and federal claims." Great Atlantic & Pacific Tea Co., Inc. v. Cottrell, 424 U.S. 366, 371, 96 S.Ct. 923, 928, 47 L.Ed.2d 55 (1976), quoting from H. P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 553, 69 S.Ct. 657, 679, 93 L.Ed. 865 (Black, J., dissenting). The traditional criteria for this "delicate adjustment" are set forth in Pike v. Bruce Church, Inc., 397 U.S. 137, 142, 90 S.Ct. 844, 847, 25 L.Ed.2d 174.

The Pike test centers on three key issues: (1) As a threshold issue, does the state law regulate evenhandedly; (2) Does the state law effectuate a legitimate local public purpose; and (3) Does it have only an incidental effect on interstate commerce. Assuming these questions are answered in the affirmative, "the Initiative will be upheld unless the burden

imposed on such commerce is clearly excessive in relation to the putative local benefits. . . ." Id. This balancing effort involves "a sensitive consideration of the weight and nature of the state regulatory concern in light of the extent of the burden imposed on the course of interstate commerce." Raymond Motor Transportation, Inc. v. Rice, supra, 434 U.S. at 441, 98 S.Ct. at 794.

The threshold issue must be answered in the negative. Where, as here, a state "overtly blocks the flow of interstate commerce at [the] State's borders," Philadelphia v. New Jersey, 437 U.S. 617, 624, 98 S.Ct. 2531, 2535, 57 L.Ed.2d 475 (1978), the state statute on its face discriminates against interstate commerce on the basis of origin. Such facial discrimination, regardless of the State's purpose, may by itself provide a sufficient basis to invalidate the statute. Id. Moreover, in

light of the Initiative's implied exemptions and the recent decision in Kassel v. Consolidated Freightways Corporation of Delaware, ___ U.S. ___, 101 S.Ct. 1309, 67 L.Ed.2d 580 (1981), it is also clear that an application of the Initiative to the movement of radioactive waste in interstate commerce would discriminate against commerce. The exemptions in the Initiative, particularly the implied exemption of all radioactive waste generated in Washington, offers the benefits of available radioactive waste storage to Washington's nuclear industry and effectively denies such benefits to the bulk of this country's nuclear industry. Moreover, since the Initiative impliedly exempts the shipment of radioactive waste through the State and, by its terms, is directed at the origin of the waste, it would appear that the State has decided that the principal harm from radioactive waste arises after

its disposal in a storage site. Thus, there is no basis to distinguish waste generated in Washington from waste generated in other states. In short, the Initiative on its face and in its plain effect is unconstitutional because it does not regulate evenhandedly. See Kassel v. Consolidated Freightways, supra; Philadelphia v. New Jersey, supra.

Even if such facial and substantive discrimination is not a per se fatal defect, "such facial discrimination invokes the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives." Hughes v. Oklahoma, 441 U.S. 322, 337, 99 S.Ct. 1727, 1737, 60 L.Ed.2d 250 (1979). The Initiative cannot withstand such scrutiny.

While it has been held that "if safety justifications are not illusory, the Court will not second-guess legislative judgment," Raymond Motor Transportation, Inc.

v. Rice, supra 434 U.S. at 449, 98 S.Ct. at 798 (Blackmun, J., concurring), the mere incantation of "a purpose to promote the public health or safety does not insulate a state law from Commerce Clause attack." Kassel v. Consolidated Freightways, ___ U.S. ___, ___, 101 S.Ct. 1309, 1316, 67 L.Ed.2d 580 (1981). This should be particularly true where, as here, the state law is a product of the Initiative process and not a product of the more detailed and deliberate approach normally associated with the state legislature.

Moreover, when discrimination against commerce is demonstrated, the State has the burden of demonstrating the local benefits flowing from the state statute and the unavailability of adequate nondiscriminatory alternatives. Hunt v. Washington Apple Advertising Comm'n., 432 U.S. 333, 353, 97 S.Ct. 2434, 2446, 53 L.Ed.2d 383 (1977). Here the defendants have failed to

present evidence that non-medical radioactive waste, transported and stored in compliance with Federal regulations, is dangerous to the health and safety of the citizens of the State of Washington. Indeed, a recent study by the Department of Social and Health Services of the State of Washington suggests that nuclear waste, if properly regulated, can be safely transported and also suggests that there are less discriminatory means to protect the public. See Stipulation of Authenticity of Documents, Exhibit 10. The closing sentence of the report's Abstract is particularly instructive:

> None of our studies detected serious personnel exposure problems, but further reductions can be obtained through the institution of better storage procedures, quicker handling techniques and maintaining greater distances from radiation sources.

Finally, the Initiative will clearly have more than an incidental effect on interstate commerce. As noted earlier,

Congress and the Department of Energy have noted the rapid growth of radioactive waste and the reduction in storage capacity. The Initiative will aggravate this national problem by substantially reducing all low-level radioactive waste storage and by precluding any commercial storage of absorbed low-level radioactive liquids.

Even if I were to consider the weight and nature of the state regulatory concern in light of the extent of the burden on interstate commerce, I would still hold that the Initiative violates the Commerce Clause. Since the State's safety interest, assuming proper compliance with adequate regulations, is at least arguably illusory and since the Initiative significantly impairs the federal interest in encouraging the peaceful use of radioactive material and in solving the radioactive waste problem, the Initiative cannot be harmonized with the Commerce Clause.

CONCLUSION

For the aforementioned reasons, I hold that the Initiative is unconstitutional and thus unenforceable. Therefore, plaintiffs' Motions for Summary Judgment are GRANTED. The Clerk shall enter judgment accordingly.

IT IS SO ORDERED.